

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KURT ANGELONE,  
Plaintiff,

v.

MICHAEL FURST, *et al*,  
Defendants.

Case No. C07-5538RJB-KLS

REPORT AND  
RECOMMENDATION

Noted for March 21, 2008

This matter has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. This matter comes before the court on plaintiff's filing of a motion for entry of default. (Dkt. #53). Having reviewed plaintiff's motion, defendants' response thereto and the remaining record, the undersigned submits the following Report and Recommendation for the Honorable Robert J. Bryan's review.

DISCUSSION

Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 55 provides as follows:

**(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

**(b) Entering a Default Judgment.**

**(1) By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant

1 who has been defaulted for not appearing and who is neither a minor nor an  
2 incompetent person.

3 (2) *By the Court.* In all other cases, the party must apply to the court for a default  
4 judgment.

5 Default judgments, however, “are generally disfavored.” Pena v. Seguros La Comercial, 770 F.2d  
6 811, 814 (9th Cir. 1985); see also Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, 840  
7 F.2d 685, 689 (9th Cir. 1988). Thus, “[w]henver it is reasonably possible, cases should be decided upon  
8 their merits.” Pena, 770 F.2d at 814 (where party with meritorious defense seeks timely relief from  
9 default judgment, any doubt should be resolved in favor of that party’s motion to set aside judgment).  
10 Indeed, default judgments are “to be used sparingly.” Mitchell v. Brown & Williamson Tobacco Corp.,  
11 294 F.3d 1309, 1316-17 (11th Cir. 2002) (“Entry of judgment by default is a drastic remedy which should  
12 be used only in extreme situations.”).

13 On November 1, 2007, the undersigned ordered service of plaintiff’s complaint on each of the  
14 defendants named therein by the United States Marshal. (Dkt. #7). On November 15, 2007, a waiver of  
15 service of summons upon defendant Louis Figueroa was received by the Court. (Dkt. #18). On November  
16 20, 2007, the undersigned received defendant Figueroa’s return of service form. (Dkt. #19). On February  
17 6, 2008, plaintiff filed his motion for entry of default against defendant Figueroa and defendant Aijaz  
18 Khursid, with respect to whom service by the United States Marshal also had been ordered.

19 On February 8, 2008, a return of service form for defendant Khursid came back unexecuted. (Dkt.  
20 #49). Apparently service was unable to be made on him, because he could not be located at the address  
21 provided by plaintiff. Id. Plaintiff asserts in his motion that while both defendant Khursid and defendant  
22 Figueroa have been served with the complaint, neither has filed an answer or otherwise appeared in this  
23 case. As just discussed, however, this is not the case with respect to defendant Khursid, as it appears he  
24 was never served. This is solely the fault of plaintiff though, and the undersigned previously informed  
25 him that it is his responsibility to provide the correct mailing address for each defendant, so that service  
26 by mail may be attempted by the United States Marshal.

27 With respect to defendant Figueroa, a notice of appearance by the Washington State Office of the  
28 Attorney General was made on his behalf on February 19, 2008. (Dkt. #55). That same day, defendant  
Figueroa filed an answer to the complaint (Dkt. #56) and his response to plaintiff’s motion (Dkt. #57).  
Pursuant to the waiver of service of summons defendant Figueroa received and returned, he had sixty (60)

1 days from November 2, 2007, or until January 1, 2008, within which to file his answer. Clearly, the filing  
2 of defendant Figueroa's answer did not occur in a timely manner.

3 Nevertheless, given that default judgments are disfavored generally and should be used sparingly  
4 in only extreme situations, and that an answer now has been filed by defendant Figueroa, plaintiff's  
5 motion for entry of default (Dkt. #53) should be denied. The undersigned further finds that the claims  
6 plaintiff has asserted against defendant Figueroa should be decided on their merits. In addition, plaintiff  
7 has not shown that defendant Figueroa's failure to file an answer to his complaint within the required time  
8 period "prejudiced him in any way," even though that answer was filed more than one and a half months  
9 late. Mitchell, 294 F.3d at 1317 (noting defendant had filed motion to dismiss within short time after  
10 deadline for responsive pleadings).

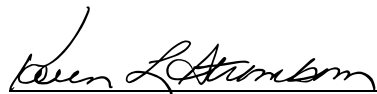
### 11 CONCLUSION

12 For all of the above reasons, the Court should deny plaintiff's motion for entry of default. (Dkt.  
13 #53).

14 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b),  
15 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
16 objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
17 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit  
18 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set this matter for consideration on **March 21,**  
19 **2008**, as noted in the caption.

20 The Clerk is directed to send a copy of this Order to plaintiff and counsel for defendants.

21 DATED this 27th day of February, 2008.

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25 Karen L. Strombom  
26 United States Magistrate Judge  
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